SERVED: March 4, 1994

NTSB Order No. EA-4106

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 4th day of March, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. LEIGH ROLAND ASLAKSON, Respondent.	)	Docket SE-13433

OPINION AND ORDER

The respondent has appealed from the initial decision Administrative Law Judge Patrick G. Geraghty rendered in this proceeding on January 25, 1994, at the conclusion of an evidentiary hearing.[1] By that decision, the law judge affirmed an emergency order of the Administrator revoking the respondent's

[1]An excerpt from the hearing transcript containing the initial decision is attached.

airline transport pilot certificate for his alleged violations of section 61.59(a)(2) of the Federal Aviation Regulations (FAR), 14 CFR Part 61.[2] For the reasons discussed below, the appeal will be denied.

By Emergency Order of Revocation dated December 20, 1993, the Administrator alleged, among other things, the following facts and circumstances concerning the respondent:

> 1. You are now, and at all times mentioned herein were the holder of Airline Transport Pilot Certificate No. 1349792.
>
> 2. Over the last few years, as an Operations Inspector for the FAA Flight Standards organization, you have made a practice of making entries on FAA Form 8410-3,

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[2]FAR section 61.59(a)(2) provides as follows:

> § 61.59 **Falsification, reproduction, or alteration of applications, certificates, logbooks, reports, or records.**
>
> (a) No person may make or cause to be made--
>
> * * * * * *
>
> (2) Any fraudulent or intentionally false entry in any logbook, record, or report that is required to be kept, made, or used, to show compliance with any requirement for the issuance, or exercise of the privileges, or [sic] any certificate or rating under this part....

> during or at the completion of FAR Part 135 competency/proficiency checks conducted by you, indicating that the airman being checked had satisfactorily completed each of the maneuvers identified on that form, when in fact not all of those maneuvers had actually been satisfactorily accomplished.
>
> 3. By way of specific example, you conducted competency/proficiency checks for Gerald Mobley on August 29, 1989, December 28, 1989, June 22, 1990, January 18, 1991, and July 19, 1991.
>
> 4. On the dates identified in paragraph 3, above, you made entries on an FAA Form 8410-3 indicating that Mr. Mobley had satisfactorily completed each of the maneuvers identified on that form, when in fact Mr. Mobley did not satisfactorily complete each of those maneuvers.
>
> 5. The above-referenced entries made by you were fraudulent or intentionally false, and were made on a record required to be kept, made or used to show compliance with the requirements for the exercise of...a certificate issued under Part 61 of the Federal Aviation Regulations, in operations under Part 135 of the Federal Aviation Regulations.

The evidence introduced by the Administrator at the hearing actually established conduct more condemnable than that described in the revocation order, which served as the complaint, for it showed that respondent was not just indicating that some maneuvers had been satisfactorily accomplished when they had not been completed, but he was also marking as satisfactorily accomplished maneuvers that had not even been attempted.

While denying any intent to falsify the competency/proficiency forms at issue, respondent did not, in rebuttal, attempt to contradict the Administrator's evidentiary

case.[3] Instead, he maintained, among other things, that any mismarking of the forms was attributable to a lack of instruction or training as to how properly to note on them that a maneuver had been waived or did not need to be demonstrated.[4] The law judge in effect concluded, to the contrary, that respondent had intended by his admittedly incorrect satisfactory markings to falsely register that various unperformed maneuvers or tasks had been successfully done.[5]

On appeal, respondent, without directly challenging the law judge's factual conclusions, raises various objections,[6] most of

[3]FAA Form 8410-3, entitled "Airman Competency/Proficiency Check," is the form commonly used for recording the results of required periodic examinations of the qualifications of Part 135 pilots. It provides, inter alia, blocks for entering either an "S" for satisfactory or a "U" for unsatisfactory with respect to a pilot's performance in some thirty areas in which knowledge and skill or both must be evaluated.

[4]Respondent called several inspectors as witnesses who supported his position that practices vary between inspectors as to how to mark a procedure or maneuver that could not or, as a matter of inspector discretion, would not be performed, with some voicing a preference for either a dash or a N/A in the relevant block, perhaps with an explanatory note in the remarks section of the form. However, while there was some consensus that a partially completed maneuver, whose successful outcome if completed was not or would not have been in doubt, could be marked satisfactory, none of them agreed that it would ever be appropriate to put an "S" in a block for a maneuver that had been waived or not demonstrated at all.

[5]The law judge, in carefully reviewing all of the evidence, took note of the fact that on three of the five Form 8410-3's admitted into evidence against him, see Adm. Exh. C-1, the respondent had marked blocks "NA." This circumstance, we think, substantially undermines any claim that he genuinely believed that unperformed maneuvers could properly be marked with an "S."

[6]We intimate no view on respondent's contention that his certificate should be restored because the Administrator did not

which are devoid of merit and require little or no comment.[7] A few matters, however, warrant brief discussion.[8]

(..continued)
show that he was an unsafe pilot and, therefore, did not establish that an emergency requiring an immediate revocation of his certificate existed. The Board is not empowered to review the validity of the Administrator's determinations on the existence of an emergency. See, e.g., Administrator v. Klock, 6 NTSB 1530, 1532 n.9 (1989).

[7]For example, respondent, by counsel, argues that the revocation decision is "unjust" because the airman check form neither contains detailed instructions on its proper use nor a warning as to the severe consequences that might occur if it is determined that a form is "improper[ly] or negligently prepared." We think the argument frivolous. Respondent failed to establish that any other inspector had been confused by the form into giving a satisfactory grade for an unperformed task. As to the suggestion that the form should bear a warning, we are not sympathetic to the proposition that an FAA inspector, in the performance of his duty to ensure the ongoing competence of commercial pilots directly subject to his oversight responsibilities, would not appreciate that some adverse impact would flow from a determination that he was not accurately or honestly recording the results of flight checks.

[8]We agree with the Administrator that he did not have to prove that respondent's alleged conduct was fraudulent under Montana state law. The law judge found only that certain of respondent's entries on the proficiency forms were intentionally false, not fraudulent. In any event, federal, not state, law applies to this proceeding. Under Hart v. McLucas, 535 F.2d 516 (9th Cir. 1976), the law judge needed only to find, as he did, that respondent had knowingly made false, material entries on the forms. While respondent appears to argue that the entries were not material, we think it self-evident that they were, since a pilot's ability or entitlement to continue to exercise the privileges of his airman certificate in commercial operations is directly related to his periodic, successful accomplishment of the flight maneuvers the competency/proficiency form is used to grade.

Furthermore, contrary to respondent's position on brief, the Administrator was not obligated to prove that respondent had a motive for falsifying the forms, as that is not an element of the regulatory offense. It is thus no defense that the reasons for an intentional falsification barred by the regulation are not demonstrated or even apparent on the record. What a respondent might have to "gain" from such conduct is not an issue.

Respondent argues that he is not a "person" within the meaning of FAR section 61.59(a)(2), and therefore, the regulation is not applicable to him. This is so, he maintains, because an inspector's check airman duties are performed on behalf of the Administrator, and the Administrator is not included within the FAR's definition of "person."[9] We do not agree that the broad ban against anyone making or causing to be made a false or fraudulent entry in certain records relevant to the certification process cannot apply to the respondent unless the Administrator is a person under the regulation. See Administrator v. Hartwig, 6 NTSB 788 (1989)(Rejecting contention that FAR section 61.59 did not apply to falsifications committed by a designated flight examiner). The purpose of this proceeding is to review the Administrator's determination that the respondent, in his individual capacity, no longer possesses the qualification to hold an ATP pilot certificate based on his asserted falsification of airman records. It has nothing to do with respondent's accountability to the Administrator, either as his delegate or agent while performing the duties of an inspector or as an employee of the FAA or federal government.[10] In other words, while the answer may be the same because the conduct at issue

[9]FAR section 1.1 defines person to mean "an individual, firm, partnership, corporation, company, joint-stock association, or governmental entity...."

[10]This proceeding also has nothing to do with respondent's possible liability to others for any improper or negligent performance of his official duties.

obviously bears on respondent's status both as an airman and as an FAA inspector, the only question before us is whether the respondent, as an individual, has the care, judgment, and responsibility to be a certificate holder, not whether he possesses, as a government employee, the necessary qualifications to be an inspector for the Administrator. In sum, we have no hesitancy in concluding that respondent is a person within the reach of the prohibitions in the regulation.[11]

Respondent also contends that he should be given a new hearing before a different law judge because Law Judge Geraghty in October 1993, presided over a related case (involving Cardinal Drilling's air taxi certificate) in which respondent testified as a witness. The law judge's decision in that case, according to respondent, compels the view that the law judge has or would have a bias or predisposition against him in this case, in that the law judge there made certain negative comments concerning respondent's performance of his check airman duties, which he indicated amounted to "malfeasance," and, arguably, his credibility, when he observed in the earlier case that he was not "impressed" by the respondent.[12] We find no basis for a new

[11]Although counsel for the Administrator takes the position that the Administrator should be deemed a "person" under the regulation as the head of a government entity, we do not find it necessary, in light of the analysis set forth above, to decide that issue in this case. See Adm. Br. at 7.

[12]The law judge on January 20, 1994, denied a motion by respondent that he disqualify himself from hearing this case. He there rejected any suggestion that he had formed any bias or prejudice concerning respondent based on any prior matter and

hearing.

We think it understandable that the respondent might be concerned that the law judge's decision in this case, in which his credibility as a party is at issue, may be influenced by the law judge's prior assessment of him in an earlier matter in which he appeared as a witness. Nevertheless, respondent cites no authority for the proposition that the law judge should have disqualified himself, and we perceive no basis for finding that the law judge's disposition does not reflect a thorough, fair, and impartial judgment on all relevant matters.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied, and

2. The initial decision and the emergency order of revocation are affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

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stated that his "determination in this case will be reached, as it was in the prior cases, solely upon the oral and documentary evidence offered and received in open proceeding."